IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 589.

BALL ENGINEERING CO., *Petitioner,*

vs.

J. G. WHITE & CO., a Corporation, *Respondent.*

BRIEF ON BEHALF OF THE UNITED STATES, JOINT PETITIONER.

The case has been so well set out in the petition and brief filed in behalf of the Ball Engineering Company that we have little to add in behalf of the United States.

As a preliminary to the brief we wish to point out that the respondent, J. G. White & Co., with the knowledge that the plant and materials did not belong to the Hubbard Company, and had never belonged to the Hubbard Company, and after negotiations with the Ball Engineering Company for the rental or purchase from that company of said plant and materials had failed to result in agreement on a price, procured possession of peti-

tioner's property with the assistance of a Government officer (upon conditions specifically exempting the Government from liability), and having procured possession of the property of the Ball Engineering Company on the site of the work, the White Company used that property in the completion of the lock and dam. Such action on the part of the respondent obviously amounted to conversion of the property of the Ball Engineering Company unless the United States in some way obtained the right to the property of the Ball Engineering Company on the site and transferred said right to the White Company.

The Circuit Court of Appeals, as well as the lower court, rejected the theory on which the Government and the respondent actually proceeded in seizing the petitioner's property and therefore the only way in which the respondent can escape liability for conversion is on the theory that the Government *did* acquire title to the property of the Ball Engineering Company under the right of eminent domain.

In the argument of the case before the Circuit Court of Appeals brief was submitted on behalf of the United States as *amicus curiae,* but believing that the decision below is erroneous and that this ruling to the effect that the United States is liable on an implied contract where property is taken by one of its agents under the circumstances disclosed in this record will have an important and detrimental effect on the rights of the United States under contracts of this character, the United States has joined in the prayer of the petition of the Ball Engineering Company for the granting of a Writ of Certiorari in this case, and that the decision of the Court below is erroneous, it begs leave to submit the following suggestions:

POINT I.

Where the case is not founded on the Constitution of the United States or a law thereof, or a regulation of an Executive Department, no recovery can be had if the case be one sounding in tort.

(*a.*) In United States *v.* Buffalo Pitts Co., 193 Fed. 905, 908, 909, the Court of Appeals analyzed Justice Brown's decision in Dooley's case, 182 U. S. 222, and his concurring opinion in United States *v*, Lynah, 188 U. S. 445, 474, and reached the following conclusion:

> "Accordingly we think the judgment below right, whether it rested on an implied contract of the Government to pay within the opinion of Mr. Justice Brewer in the Dooley Case or upon its constitutional obligation within the opinion of Mr. Justice Brown."

In its first decision of the case at bar, the Circuit Court of Appeals (223 Fed. 618, 620), said:

> "It (the Government) made no proprietary claim and therefore was bound to pay the real owner for the property, whether the taking was tortious or not."

(*b.*) It may be assumed that this statement of the law is correct, although it has never been adopted by this Court, but we deem it necessary as briefly as possible to consider the authorities.

(*c.*) It is true that in the Dooley Case, Justice Brown expressed the view that the limitation "cases not sounding in tort" in the Tucker Act applies only to actions for damages, so that a plaintiff can, as regards the United States, waive a tort and sue on the common counts; but

the remark was a mere dictum, for he concludes his opinion by holding (182 U. S. 228) that whether the importer could waive the tort and sue on an implied contract was immaterial as the case was one **founded on a law of Congress.** This is brought out by the most recent decision of this Court in this class of cases—United States *v.* Emery, 237 U. S. 28, 32—where the Court said:

> "However gradually the result may have been approached in earlier cases, it now has become accepted law that claims like the present are 'founded upon the revenue law.'"

It is further shown by the case of Russell *v.* United States, 182 U. S. 516, 530, 535 (a decision in the same volume as the Dooley Case, and in which Justice Brown joined), where the Court said:

> "This Court has held that under the Act of March 3, 1887, 24 Stat. 505, c. 539, defining claims of which the Court of Claims had jurisdiction, the Court had no jurisdiction of demands against the United States founded on torts. Schillinger *v.* United States, 155 U. S. 163; United States *v.* Berdan Fire-Arms Co., 156 U. S. 552. In other words, to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—'a coming together of minds.'"

And again in conclusion (p. 535)

> "This doctrine may be technical. If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued

in an action sounding in tort, this Court has declared, as we have seen."

As to the Lynah case, it is true that Justice Brown repeated the remarks made by him in the Dooley Case (188 U. S. 475), but this repetition was likewise a dictum, for he held that the case, being one of a taking as a sovereign of private property for public uses, was founded on the Constitution of the United States, so that no implied contract was necessary. Even so limited, the majority of the Court did not agree with him, but placed the decision on the ground of an implied contract, and in Peabody *v.* United States, 231 U. S. 530 (which was either a case of taking under the power of eminent domain, or nothing), the Court said (231 U. S. 539):

> "The suit must rest upon contract, as the Government has not consented to be sued for torts, even though committed by its officers in the discharge of their official duties * * *; and a contract to pay cannot be implied unless there has been an actual appropriation of property."

(Citing among other cases Russell *v.* United States, *supra*). In the Peabody case the officers acted under authority of an Act of Congress.

However, we have no disposition to question the correctness of Justice Brown's views. We only desire to call the Court's attention to their limitations, and to the firm attitude of this Court from the beginning up to the present day on the position that no implied contract can be set up against the United States in a case sounding in tort.

(*d.*) The Russell case, *supra,* was followed in Harley's Case, 198 U. S. 229, where the Court excluded from the jurisdiction "those contracts **or obligations** that the law is said to imply from a tort" (198 U. S. 234). In Juragua Iron Co. *v.* United States, 212 U. S. 297, 309, Russell's and Harley's Cases are relied on where there was clearly a taking for public use. It was held that, even if the laws of war did not justify the taking, it was a mere tort and hence "a claim against the Government for **compensation** on account thereof would make a case "sounding in tort." (The action was one to recover the value of the property taken, without damages.) In Crozier *v.* Krupp, 224 U. S. 290, 303, 304, Russell's and Harley's Cases are again affirmed, and the rule is stated that in case of infringement of a patent,

> "* * * the power to sue the United States for redress did not obtain unless from the proof it was established that a contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers."

It was held that the United States by statute had now authorized the appropriation of such property as sovereign, and payment therefor. In United States *v.* Buffalo Pitts Co., 234 U. S. 228, 232, the Court again stated that there could be no recovery for acts merely tortious, repeated the distinction taken in the Lynah Case between the assertion of a proprietary and of a sovereign right, and placed its decision on the Act of Congress, and the Government's use of the claimant's property without disputing his title and without denying his right to com-

pensation. Finally, in New Orleans-Belize S. S. Co. *v.* United States, 239 U. S. 202, 206, 207, the Court reaffirmed the position taken in its prior decisions.

It therefore appears clearly and emphatically, from a long line of decisions of this Court, that unless the case is founded on the Constitution or on some law of the United States, no recovery can be had in a case sounding in tort.

POINT II.

The claim of the Ball Engineering Company against the United States, if any, does not arise under the Constitution, and, therefore, necessarily is a case sounding in tort.

(*a.*) There is no claim made that the case is founded on any law of the United States or any regulation of an Executive Department. It must, therefore, either be founded on the Constitution, or be on an implied contract or for damages. If, however, the United States did not rightfully take possession of the property under the Constitution, it must have acted under the provisions of the contract with the Hubbard Company. Since, however, the Circuit Court of Appeals has decided that it had no such right under the Hubbard contract, its action or that of its officers must have been tortious, and the claim of the Ball Engineering Company against it, if any, must have been one sounding in tort.

(*b.*) The question is, therefore, whether the claim arose under the Constitution; that is, since the Fifth Amendment is the only provision of the Constitution

claimed to be applicable, whether the United States took the property of the Ball Engineering Company for public use under the power of eminent domain.

We are not aware of any power in the officers of the United States to take property for public use in times of peace without the authority of an Act of Congress or of a regulation having the force of law (a condition which existed in the Buffalo Pitts Case, but does not exist here). Waiving this point, however, the Lynah Case, *supra*, has clearly stated the conditions under which the United States will or will not be held to have taken property under the Fifth Amendment, and the statement was affirmed in the Buffalo Pitts Case. Where the United States, not denying the title of the claimant, asserts its right to take his property by virtue of a paramount governmental right, it proceeds under the power of eminent domain. Where, however, it is not asserting a governmental right, but claims that its right to the possession or ownership of property is superior to that of the claimant by virtue of the ordinary rules of private law, there it is not asserting its overriding right of sovereignty, and if its title be defective under the law it has invoked, its action is merely tortious and *damnum absque injuria*. Moreover, whether the United States was, in any particular case, asserting its sovereign right depends upon its intent as gathered from all the facts. As said in the Peabody Case, *supra* (231 U. S. 538, 539):

> "But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the Government to impose it."

(*c.*) Applying these principles to the case at bar, the findings seem to be inconsistent with any other view than that the Government intended merely to assert a proprietary right arising out of the rules of private law, and had no notion of asserting a sovereign title, paramount to the admitted right of the claimant. This clearly appears, as it seems to us, from a comparison of finding 6 (Rec. 36)—made to conform to the decision of the Circuit Court of Appeals upon the first appeal—with the prior findings. There seems to be a complete *non sequitur*—a material gap which has not been bridged. All of the other findings are emphatic to the effect that the United States took possession of the property under the provisions of paragraph 33 of the Hubbard specifications and not otherwise. The answer of the White Company so alleged (Rec. 15), and all the evidence without any exception was to the same effect. The White Company requested the United States to proceed under this paragraph (Rec. 64), the United States had bound itself to do so at the White Company's request (Rec. 79), the Ball Engineering Company was notified that the United States claimed the right under paragraph 33, and that it did not recognize any title in the Ball Engineering Company (Rec. 94, 95), the Hubbard Company was directly notified to the same effect (Rec. 101), and the Ball Engineering Company was warned that the United States, having taken physical possession under the terms of the Hubbard contract, would treat any attempt to remove the property as a trespass Rec. 107). Nothing can be more certain, therefore, than that the United States intended to take possession, and did in fact take possession, under a claim of superior right arising out of the provisions of paragraph 33 of the Hubbard specifications.

Apparently the Circuit Court of Appeals took the same view at the first hearing, for it said (223 Fed. 620):

> "It" (the United States) "professed to act under Section 33 of the contract with the Hubbard Company."

That Court surely cannot have meant to say that the United States was merely using paragraph 33 as a cloak while in reality intending to assert and in fact asserting its sovereign power of eminent domain; and just as surely that Court cannot have meant to hold that because the United States was wrong as to the validity of the right under which it acted, it must be taken to have acted under its sovereign right of eminent domain, whether it intended to or not, for such a holding would be directly contrary to the law as repeatedly laid down by this Court.

(*e.*) The decision of the Circuit Court of Appeals seems to rest upon the statement that, although the United States intended to act and did act under paragraph 33 of the Hubbard specifications, yet it did not thereby make any proprietary claim. With great respect for the opinion of that Court, we are unable to understand what a "proprietary claim" would be, if this was not one. The claim of the United States fell and was intended to fall under the following formula: If A make a contract with X by which X agrees to erect a building for A, and the contract contain a provision that, on X's default with annulment of the contract, A shall have the right to take possession of all materials, etc., prepared for use or in use in the prosecution of the work and M, a subcontractor under X, brings materials, etc., on the *situs*, using them in the prosecution of the work, then A on annulment has the right to take possession of

M's materials, etc., M for this purpose being merely X's agent (Rec. 95). Can there be any doubt that this was the consistent position of the United States? But this formula is one of private law and is applicable to private persons as much as to the United States. No claim was made that any statute gave the United States special rights, and the right of eminent domain was never even hinted at. All that it was intended to assert, and all that was in fact asserted was that under the general law of contracts and of agency the United States—like any private person in its situation—had a right to the possession of the materials. Such a claim is necessarily one of proprietary right—of a superior right of ownership or of possession under the rules of private law. Hence the possession, if not justified by those rules, was tortious. and no contract for compensation can be implied against the United States.

(*f.*) There are certain special features of the case at bar bearing upon its merits, irrespective of technical considerations, which, we believe, should be called to the Court's attention. The defendant in the case is in reality the Surety Company which was surety on the contract with the Hubbard Company with the United States. In order to minimize its loss on the Hubbard contract, it took over its fulfillment, and employed the White Company as its agent for this purpose. Its general counsel has appeared as attorney of record for the White Company (Rec. 21). It got the benefit of the credit given the Hubbard Company by the United States when it took over the materials, etc., since such credit reduced the amount for which the Surety Company was liable. For this reason the United States insisted on the provision in the White Company contract (Rec. 79, 80), in effect guaranteeing the United States against any claim by the

Ball Engineering Company. How, it may well be asked, is the exaction of such a guaranty consistent with the theory that the United States was proceeding under the power of eminent domain? What is the possible advantage of indemnity against the exercise by the sovereign of a paramount right? In this respect, as in every other, the Russel Case, *supra*, seems decisive. In that case the United States believed that the Krag-Jorgensen patent included legally the particular device on which Russell's claim was founded. Nevertheless, it took an indemnity. Of this the Court said (182 U. S. 535):

> "As he himself" (the Commissioner of patents) "said, 'Questions of infringement belong to the Courts.' And because such questions are for the Courts the Ordnance Office, no doubt, took indemnity from the Krag-Jorgensen Company, not in concession of petitioner's claim, but for protection against it, if protection should be necessary, and whether it would be or not the Ordnance Office very naturally resolved not to determine. The prudence which takes a bond against a claim cannot be said to constitute or raise a contract in favor of the claim—cannot be said to have intended to create the liability which was meant to be forestalled."

Then, when the White Company had completed the contract, and the United States consequently offered to turn back the materials, etc., to the Hubbard Company, the Surety Company objected and the offer was withdrawn (Rec. 113-117). The result of all this is, according to the decision of the Circuit Court of Appeals, that, inspite of the bona fide efforts of the United States to assert only the rights given it by contract, and to protect itself if the Courts should decide that this assertion

was unfounded, the Ball Engineering Company can recover from the United States, which in turn would be compelled to assert a claim against the White Company; because clearly a judgment in favor of the Ball Company against the United States would destroy the effect of the provision in the White Company's contract. Surely there is nothing in the case so explained which would justify this Court in departing from the plain intent of the parties and in holding that the United States claimed, not the right which it constantly asserted, but a right which, so far as the evidence shows, it never had in mind.

Respectfully submitted,

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Solicitor General.